IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	**§**	
	§	
v.	**§**	**MO:19-CR-171-DC**
	§	
ERNESTO ORDUNEZ	**§**	

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

BEFORE THE COURT is Defendant Ernesto Ordunez's (Defendant) Motion to Suppress filed on August 22, 2019. (Doc. 21). After due consideration of the evidence and relevant law, the Court shall **GRANT** Defendant's Motion to Suppress. (Doc. 21).

I. BACKGROUND

Defendant was indicted on charges he possessed with intent to distribute a quantity of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and knowingly possessed firearms in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). (Doc. 15). Defendant filed the instant motion to suppress on August 22, 2019. (Doc. 21). The Government filed a response in opposition on August 29, 2019. (Doc. 24). The Court conducted an evidentiary hearing in this matter on September 10, 2019. With the Court's leave, Defendant filed a supplemental memorandum in support of his motion. (Doc. 27). Consequently, this motion is ready for disposition.

II. FACTS

On July 10, 2019, the Ector County Sheriff's Office executed an arrest warrant for Defendant. The warrant originated in Glasscock County, Texas and authorized Defendant's arrest for theft. Gerald Ornelas (Ornelas), an officer with the Ector County Sheriff's Office, was

assigned to the case. Ornelas testified that he decided to use the SWAT team to execute the warrant after reviewing Defendant's criminal history and noting that his record included assaults.

The officers executed the warrant at Defendant's residence in Ector County. Upon their arrival, the SWAT team broke in the door using a battering ram, threw in and detonated a stun grenade, and entered the residence. Defendant was in the living room at the time the officers entered. Officers secured Defendant in the living room. Other officers also entered Defendant's brother's bedroom and handcuffed him. Additional officers entered a bedroom shared by Defendant and his wife; Defendant's wife was present in the bedroom when the officers effected their entry. Abel Sanchez (Sanchez), one of the officers who initially entered Defendant's bedroom, testified he saw heroin on a desk in the bedroom.

Ornelas left the scene and prepared an application for a state search warrant. The state search warrant was signed and executed that evening. The officers searched the residence and premises, seizing approximately thirteen grams of heroin from the bedroom, additional small amounts of heroin and marijuana, and two firearms. (See Doc. 24-2).

III. LEGAL STANDARD

The Fourth Amendment makes the following guarantee:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. The Supreme Court has determined warrantless searches and seizures are per se unreasonable unless an exception is applicable. *See Katz v. United States*, 389 U.S. 347, 357 (1967). A warrant that does not meet the particularity requirements of the Fourth

Amendment is facially invalid, and a search or seizure conducted under its authority is unconstitutional. *See Groh v. Ramirez*, 540 U.S. 551, 558, 563 (2004).

Evidence that law enforcement officers obtain in violation of the Fourth Amendment is subject to suppression under the exclusionary rule. *United States v. Massi*, 761 F.3d 512, 520 (5th Cir. 2014). "[T]he exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and . . . evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." *Utah v. Strieff*, 579 U.S. ___, 136 S. Ct. 2056, 2061 (2016) (internal quotation marks omitted) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)).

Ordinarily, the defendant bears the burden of proving by a preponderance of the evidence that the evidence at issue was obtained in violation of the Fourth Amendment. *United States v. Guerrero-Barajas*, 240 F.3d 428, 432 (5th Cir. 2001). However, when law enforcement officers conduct a search or seizure without a warrant, the government bears the burden of proving by a preponderance of the evidence that the search or seizure was constitutional. *United States v. McKinnon*, 681 F.3d 203, 207 (5th Cir. 2012).

IV. DISCUSSION

Defendant contends that the officers inappropriately executed the arrest warrant, the officers unlawfully searched the residence, and the warrant did not meet the particularity requirement of the Fourth Amendment. The Court concludes that the officers' failure to knock and announce their presence before breaking into the residence does not warrant suppression but finds the entry into Defendant's bedroom violated the Fourth Amendment. Accordingly, the search warrant was tainted, and all evidence discovered under its authority should be suppressed.

A. Execution of the Arrest Warrant

The principle that officers of the law must announce their presence and seek admission before forcibly entering a private dwelling is "'embedded in Anglo-American law'" and "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (quoting *Miller v. United States*, 357 U.S. 301, 313 (1958)). The knock-and-announce requirement is not mandatory under all circumstances, however. *Id.* "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). The Supreme Court has rejected blanket exceptions to the knock-and-announce requirement. *Id.* at 394–95. Officers must articulate the reasonable suspicion that justified a no-knock entry. *United States v. Cantu*, 230 F.3d 148, 152 (5th Cir. 2000). "The reasonableness of the officer's suspicion is evaluated as of the time of the entry." *Trent v. Wade*, 776 F.3d 368, 378 (5th Cir. 2015).

The evidence shows the officers failed to knock and announce their presence before breaking down the door. The Government offered no justification for this failure. Nevertheless, suppression is not the appropriate remedy. The Supreme Court has held that a violation of the knock-and-announce rule does not require suppression. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006); *see also United States v. Bruno*, 487 F.3d 304, 306 (5th Cir. 2007) (holding suppression is not the remedy for violations of 18 U.S.C. § 3109, the codification of the common law's knock-and-announce requirement that applies to federal agents). "The interests protected by the knock-and-announce requirement . . . do not include the shielding of potential evidence from the government's eyes." *Hudson*, 547 U.S. at 593. Further, Defendant cites no authority decided in

the years since *Hudson* that applies the federal exclusionary rule as a remedy for a knock-and-announce violation. Accordingly, the Court finds the officers' failure to knock and announce their presence prior to breaking in the door is not a basis for suppressing the evidence.

B. Entry into the Bedroom

Defendant contends that the entry into his bedroom was an unlawful search that occurred after his arrest and before the officers obtained a search warrant. (Doc. 21 at 2). The Government asserts that Sanchez was in the bedroom "during the lawful arrest." (Doc. 24 at 4).

"[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). However, an arrest warrant does not convey the authority to "routinely search [] any room other than that in which an arrest occurs—or, for that matter, for searching through . . . concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." *Chimel v. California*, 395 U.S. 752, 763 (1969), *abrogated in part on other grounds by*, *Arizona v. Gant*, 556 U.S. 332, 335 (2009). The evidence is that Defendant was seized in the living room before Sanchez entered Defendant's bedroom. Accordingly, Sanchez's entry into Defendant's bedroom cannot be justified under the arrest warrant.

Exceptions to *Chimel*'s limitation on searches of a home incident to an arrest include a search of the immediately adjacent area and a protective sweep. *See Maryland v. Buie*, 494 U.S. 325, 334 (1990). In *Buie*, The Supreme Court held the following:

> as an incident to the arrest the officers could, as a precautionary matter and without probable case or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a

> reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

494 U.S. at 334. The second type of search described in *Buie* is what is referred to as a protective sweep. *See United States v. Garcia-Lopez*, 809 F.3d 834, 838 (5th Cir. 2016). The *Buie* Court emphasized that a protective sweep is a "cursory inspection" and "lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." 494 U.S. at 335–36.

In the instant case, the Government bears the burden of establishing the constitutionality of Sanchez's entry into the bedroom.[1] *See McKinnon*, 681 F.3d at 207. There "is no general security check exception to the warrant requirement." *See United States v. Maldonado*, 472 F.3d 388, 394 (5th Cir. 2006), *abrogated on other grounds by*, *Kentucky v. King*, 563 U.S. 452 (2011). The Government has not argued—and there is no evidence in the record that shows—the bedroom was immediately adjacent to the place of Defendant's arrest and could be searched without reasonable suspicion under *Buie*. *See* 494 U.S. at 335. Further, the Government has not argued the entry into the bedroom was justified as a protective sweep under *Buie*.

Additionally, Ornelas and Sanchez's testimony did not include articulable facts that "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *See Buie*, 494 U.S at 335. At most, there is evidence in the record that Defendant's criminal history includes at least one assault, and the residence was in a high-crime area.

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1. The Government emphasizes that Sanchez observed the heroin in plain view. The plain-view doctrine provides that an officer may seize an item of contraband without a warrant but the item must be in plain view and "its incriminating character must also be 'immediately apparent.'" *Horton v. California*, 496 U.S. 128, 136 (1990) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)). "It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Id.* Critically, the plain-view doctrine is a seizure doctrine, rather than a search doctrine. Accordingly, it does not justify Sanchez's presence in Defendant's bedroom; he must have had a lawful independent reason to be in the bedroom.

The Fifth Circuit has considered a defendant's criminal history to be a factor relevant to the determination of whether a protective sweep was justified. *See, e.g.*, *United States v. Silva*, 865 F.3d 238, 241 (5th Cir. 2017); *United States v. Berthelot*, 326 F. App'x 795, 797 (5th Cir. 2009). In *Silva*, the Fifth Circuit considered the defendant's criminal history in conjunction with his gang membership, and the possible presence of a weapon in determining a protective sweep was warranted. 865 F.3d at 240, 242; *see also Berthelot*, 326 F. App'x at 797 (considering the defendant's "criminal history, his history of weapons possession, the time it took him to answer the door, and the presence of another individual in his home" in the protective-sweep analysis). However, a defendant's violent criminal history alone is insufficient to justify the protective sweep, particularly since *Buie*'s rationale for the protective sweep rests on the reasonable suspicion, supported by articulable facts, that an individual *other than the defendant* poses a danger to the officers. *See* 494 U.S. at 334.

With respect to the prevalence of crime in a neighborhood, the Supreme Court has held that mere presence in a high-crime area is insufficient to establish reasonable suspicion of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Brown v. Texas*, 443 U.S. 47, 52 (1979). The Fifth Circuit has not addressed whether the incidence of criminal activity in a neighborhood is an articulable fact that can give rise to a reasonable belief that there is an individual posing a danger in the area to be swept. However, the character of the neighborhood has been treated as a factor in the protective-sweep analysis by other circuits. *See United States v. Martins*, 413 F.3d 139, 150 (1st Cir. 2005), *abrogated in part by*, *Hill v. Walsh*, 884 F.3d 16, 19 (1st Cir. 2018) (noting that presence in high-crime area alone is insufficient, but can be considered in combination with other factors); *United States v. Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991) (concluding the fact the "neighborhood was one of the most violent and

dangerous in East St. Louis" was one of several factors justifying a protective sweep); *but see United States v. Garza*, 125 F. App'x 927, 933 (10th Cir. 2005) (finding "the reputation of the neighborhood" in conjunction with other factors did not justify a protective sweep).

Courts that have considered a defendant's criminal history and presence in a high-crime area as facts that supply reasonable suspicion to justify a protective sweep also considered additional facts in their determinations. There are no additional facts in the record before the Court. Moreover, neither Ornelas nor Sanchez testified that they had any suspicion there was someone in the bedroom that presented a threat to the officers on the scene.

The Government has neither proved that the officers had the requisite reasonable suspicion to conduct a protective sweep, nor established that any other exception to the Fourth Amendment is applicable. Accordingly, the Court holds the entry into Defendant's bedroom violated the Fourth Amendment. As the information about the heroin was obtained in violation of the Fourth Amendment, the warrant is tainted, and evidence seized under its authority is subject to suppression as the fruit of a poisonous tree. *See Streiff*, 136 S. Ct. at 2061 (discussing suppression of evidence that was derivative of an illegality).

V. CONCLUSION

Based on the foregoing discussion, the Court **GRANTS** Defendant's Motion to Suppress. (Doc. 21).

It is so **ORDERED**.

SIGNED this 21st day of September, 2019.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE